CLERK'S COPY

Certificate and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 72

B. K. ISAACS, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF HENRIETTA E. CUNNINGHAM, BANKRUPT,

vs.

HOBBS TIE & TIMBER COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE FILED APRIL 5, 1930

RECORD FILED MAY 19, 1930

(34,926)

(34,926)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1930

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IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

MARCH TERM, A. D. 1930

No. 8584

B. K. ISAACS, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, Appellant,

vs.

HOBBS TIE & TIMBER COMPANY, a Corporation, Appellee.

Appeal from the District Court of the United States for the Western District of Arkansas

CERTIFICATE FILED MAR. 24, 1930

The United States Circuit Court of Appeals for the Eighth Circuit certifies that a record on an appeal in the above case, now pending in such court, discloses the following:

The estate of Henrietta E. Cunningham is being administered in the bankruptcy court of the Northern District of Texas and B. K. Isaacs is the trustee therein. The estate includes a large acreage of timber land located entirely within the Western Judicial District of Arkansas. The indebtedness being in default, the holder of notes secured by a mortgage upon such land filed a foreclosure proceeding in the proper State court. The petition therein named the bankrupt and the trustee as defendants and stated that the bankruptcy proceeding was in course in the Texas District and that the land had been conveyed by the bankrupt to the trustee. The petition contained the usual allegations in a foreclosure suit and also that the secured note had not been filed as a claim in the bankruptcy proceeding. The above defendants, specially appearing, removed the proceeding to the District Court for the Western District of Arkansas. The trustee answered, alleging (among other things) his right and title as trustee; that, for lack of in-

formation, the execution of the note and mortgage and the payments thereon were not admitted nor denied; that plaintiff is the owner of the note; "that the property hereinbefore described was duly listed as an asset of the estate of the bankrupt in said bankruptcy proceeding in the Northern District of Texas in the schedules filed by the bankrupts therein on the 20th day of August, 1920, and upon his appointment and qualification as aforesaid, the defendant entered into possession of said premises and since that time, and at the present time, he has been in lawful and peaceable possession thereof as trustee in bankruptcy aforesaid"; that the bankrupts are insolvent; that the indebtedness against the bankrupts exceeded $350,000.00; that the unsecured creditors had filed claims which had been allowed in excess of $250,000.00; that there is located on the lands involved in excess of twenty-five million feet of uncut hard-[fol. 2] wood timber; that the reasonable value of the property, including the timber and an abandoned railroad thereon is in excess of $125,000.00, which leaves an equity for the benefit of the general creditors over and above the claim of the plaintiff of more than $60,000.00; that if the mortgage be foreclosed and the property sold otherwise than in due course of administration by the court of bankruptcy it would result in great loss and detriment to the general creditors of the estate and seriously embarrass and impede the due and proper administration of the estates of the bankrupts; "that he has not in the short time intervening since his appointment and qualification been able to fully search out and learn all of the facts pertaining to the lands in question that it is necessary for him to know in order to properly administer said estates. In this connection the defendant is informed and believes, and upon such information and belief alleges the fact to be, that at the present time the general economic conditions prevailing in the lumber industry are such that it is impossible and impracticable to sell said property, and a sale thereof at this time would result in the sacrifice thereof for an amount greatly under its real value under ordinary conditions. That it is in fact advisable and to the best interest of said estates that the defendant be given time and opportunity to dispose of said property at private sale in due course of administration of said bankrupt estates after he has obtained accurate

knowledge of the amount, quality and value of the timber thereon and after he has the opportunity of putting the property on the market"; that neither the trustee nor the court conducting the bankruptcy had consented to foreclosure of the mortgage and that the District Court for the Northern District of Texas had "exclusive jurisdiction to ascertain the facts and administer said property." The answer concludes as follows:

"By reason of the foregoing facts, the property in question being in the custody and possession of the defendant, as trustee in bankruptcy in the District Court of the United States for the Northern District of Texas, this Honorable Court can proceed no further herein than to pass upon the validity of the alleged mortgage lien of the plaintiff and the rights and interest of the other defendants herein in the premises and fix the amount of the plaintiff's indebtedness against said property. This Honorable Court has no power, jurisdiction or authority by reason of the premises, to administer upon said property by determining when the same shall be sold, how the same shall be sold or to order a sale thereof, these matters being soley and exclusively matters of administration for the District Court of the United States for the Northern District of Texas, at Fort Worth, sitting in bankruptcy.

Wherefore, this defendant prays that upon hearing hereof the court establish and fix the lien claims and interest of the plaintiff and of the various defendants herein and thereupon proceed no further with this suit; that the prayer of the plaintiff, that said property be ordered sold, and sold, be in all things denied and that this defendant go hence without day without costs."

By an amendment to the answer, the trustee pleaded that the referee in bankruptcy of the Northern District of Texas had made an order, about three months prior to filing of the foreclosure proceedings, "authorizing and directing this defendant to offer for sale and sell all, or any part, of the estates of the bankrupt aforesaid, at public or private sale, for cash, or on terms, and subject to or free of liens". So far as this record shows, no action toward sale of this land had been taken by the trustee up to the entry of this decree, about six months after the above order of the referee.

[fol. 3] A motion to strike out "all that part of the answer * * * which seeks to delay judgment and sale" and for judgment on the pleadings was sustained and a decree of foreclosure and sale was entered, which (among other things) provided that "if there be a surplus over and above the amount to pay said judgment, interest and costs, that the same be turned over after all expenses have been paid, to the said B. K. Isaacs as trustee in bankruptcy for the estate of the said Henrietta E. Cunningham."

It is further certified that the following question of law arises from the record and is presented, the decision of which is indispensable to a determination of the case. To the end that this Court may properly discharge its duty, it desires the instruction of the Supreme Court upon it:

Question 1. After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale by the truste, of all of the property of the bankrupt but before the trustee has taken any steps to sell land (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?

Kimbough Stone, United States Circuit Judge.
Wilbur F. Booth, United States Circuit Judge.
Archibald K. Gardner, United States Circuit Judge.

[File endorsement omitted.]

[fols. 4 & 5] Certificate to foregoing paper omitted in printing.

[fol. 6] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on W. N. Ivie, filed April 10, 1921, omitted in printing.

[fol. 2] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS

WRIT OF ERROR AND CLERK'S RETURN—Filed April 10, 1929

UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court, before you, or some of you, between B. K. Isaacs, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, Appellant, and Hobbs Tie & Timber Company, a corporation, Appellee, a manifest error hath happened, to the great damage of the said B. K. Isaacs, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, Appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the same at Saint Louis, Missouri, in not exceeding thirty days from 10th day of April, 1929, being the date of issuance of the citation herein, in the United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the 10th day of April, in the year of our Lord one thousand nine hundred twenty-nine.

Wm. S. Wellshear, Clerk of the District Court of the United States, Western District of Arkansas.
(Seal U. S. Dist. Court, West. Dist. Ark.)

Allowed by Frank A. Youmans, United States District Judge.

[fol. 3] Return to Writ

UNITED STATES OF AMERICA,
Western District of Arkansas, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said United States District Court, for the Western District of Arkansas, at office in the City of Fort Smith, Arkansas, this 12th day of April, A. D. 1929.

Wm. S. Wellshear, Clerk District Court of the United States, Western District of Arkansas. (Seal U. S. Dist. Court, West. Dist. of Ark.)

It is hereby certified that a copy of this writ is this day lodged in the Clerk's Office for the use of the appellee, the 10th day of April, 1929.

Wm. S. Wellshear, Clerk. (Seal U. S. Dist. Court, West. Dist. of Ark.)

[File endorsement omitted.]

[Caption omitted]

[fol. 4] In Chancery Court of Benton County

No. 5031

Home Fir & Timber Company, a Corporation, Plaintiff,

vs.

Bankers Trust Company, a Corporation; J. Ernest Tennyson, C. C. Binns, Henrietta E. Cunningham, T. P. Perkins and Wife; Mrs. T. P. Perkins; and B. K. Isaacs, as Trustee in Bankruptcy for the United States District Court in and for the Northern District of Texas and the Ft. Worth Division Thereof; and of the Estate of Henrietta E. Cunningham, a Bankrupt, Defendants

Complaint. Filed Dec. 12, 1928

Comes the plaintiff and for its cause of action and complaint, states, that it is a corporation organized and exist-

ing under the laws of the State of Delaware with its Principal place of business in the City of Wilmington in said state, and is admitted as a foreign corporation to do business in the State of Arkansas. That on the 27th day of September, 1921, J. L. Cunningham and wife Henrietta E. Cunningham, made, executed and delivered to the Holland Banking Company, at that time a banking corporation organized and existing under the laws of the State of Missouri with its principal place of business in the City of Springfield in said state, their promissory note in the sum of $76,000.00 due and payable on the first day of October, 1924, and with the interest thereon from date until paid at the rate of 7% per annum. A true copy of said note being hereto attached marked Exhibit "A" and made a part hereof.

Plaintiff states that on the same day and to secure said note at maturity the said J. L. Cunningham and wife, Henrietta E. Cunningham, made, executed and delivered to said Holland Banking Company their Mortgage Deed covering the following described lands located in Benton, Madison and Washington Counties, Arkansas, together with a certain line of railroad as fully described and set forth therein, together with all rails, ties, right of way and rolling stock thereon, said land and railroad being fully described and set forth as follows, to wit, and as contained in a deed of conveyance from J. L. Cunningham and wife, Henrietta E. Cunningham to T. P. Roberts, as follows:

[fol. 5] STATE OF TEXAS,
County of Palo Pinto, ss:

Know All Men By These Presents: That we, J. L. Cunningham and wife Henrietta C. Cunningham of the Palo Pinto in the state aforesaid, for and in consideration of the sum of Ten ($10.00) Dollars, to us in hand paid by T. P. Perkins, the receipt of which is hereby acknowledged, and confessed and this conveyance being subject to an incumbrance of Seventy-nine Thousand ($79,000.00) Dollars in favor of the Holland Banking Company of Springfield, Missouri and which mature October 1, 1924, secured by mortgage on the hereinafter described lands, have granted, sold and conveyed and by these presents do grant, sell and con-

vey unto the said T. P. Perkins of the County of Palo Pinto in the State of Texas, all these certain lots, tracts or parcels of land and consisting of about 12,560 acres more or less situated in the Counties of Benton, Madison, and Washington in the State of Arkansas, known as being part of the Blackburn tract, and about five miles of constructed tram railroad and about three miles of constructed dumps of road bed and right of way, all of which is more fully described and designated in that deed heretofore executed by the Trustees for the Bankers Trust Company, Inc., to Moard Tie and Timber Co. of date October 2, 1919 and of record in Volume 144 at pages 639 to 643 inclusive on the Deed Records of Benton County, Arkansas, described in detail as follows, to-wit:

(The detail description of lands here set out in the complaint is omitted from this transcript on appeal pursuant to paragraph 1 of the praecipe of counsel.)

To have and to hold the above described premises together with all and the singular the rights, and appurtenances thereto or in anywise belonging unto the said T. P. Perkins his heirs and assigns forever and we hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend, all and singular the title to said lands and premises unto the said T. P. Perkins, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, and I, Henrietta E. Cunningham, wife of the said J. L. Cunningham do hereby release and relinquish all my rights and title of homestead and dowery in all the lands and premises herein.

Witness our hands at Mineral Wells, Texas this the 18th day of April, 1924.

J. L. Cunningham, Henrietta E. Cunningham.

[fol. 6] State of Texas,
County of Palo Pinto, ss:

Be it remembered, that on this day came before me the undersigned, Mindon York, Notary Public within and for the county aforesaid duly commissioned and acting J. L. Cunningham, to me well known as the grantor in the foregoing deed, and stated that he had executed the same for

the consideration and purposes therein mentioned and set forth.

And on the same day also voluntarily appeared before me, Henrietta E. Cunningham, wife of the said J. L. Cunningham to me well known as the person signing said deed, and in the absence of her said husband, declared that she had of her own free will signed and sealed the relinquishment of dower and homestead in the foregoing deed expressed for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public on this 21st day of April, A. D. 1924.

Mindon York, Notary Public in and for Palo Pinto County, Texas.

Filed for record this the 31st day of January, 1925, at 8 o'clock, P. M. and recorded on the same day 1925.

D. Simpson, Recorder.

State of Arkansas,
County of Madison, ss:

I, Harold J. Brashears, Clerk of the Circuit and Chancery Court of the State and County aforesaid do hereby certify that the foregoing is a true and correct copy as taken from Deed Record No. 59 at page 248 of the Deed Records of Madison County, Arkansas.

Witness my hand and official seal this the 24th day of September, 1928.

Harold J. Brashears, Circuit Clerk. (Seal.)

Plaintiff states that on December 12, 1927, Towne Young and F. M. McDavid as Trustees for the Bankers Trust Company, a corporation of Dallas, Texas, became the owners of said lands, railroad and right of way and all property described, as above set forth, by virtue of sale from the Bankrupt Court of the United States in and for the Western [fol. 7] District of Arkansas and the Ft. Smith Division thereof, in the matter of the Ozark Land and Lumber Company, bankrupt, being No. 456 in Bankruptcy, wherein Perry N. Clark was Trustee and under and by orders of

said bankrupt court said property was sold by the said Perry N. Clark and the said Towne Young and F. M. McDavid became the purchasers thereof and received a deed from the said Perry N. Clark as such Trustee in Bankruptcy in and for the United States District Court, Western District of Arkansas and the Ft. Smith Division thereof. That thereafter the said Towne Young and F. M. McDavid as trustees for the Bankers Trust Company of Dallas, Texas, executed a certain Mortgage Deed in the sum of $16,670.00 on said lands, railroad and right of way to Holland Banking Company of Springfield, Missouri, which appears of record in Mortgage Record 65 at page 242, but that said Mortgage was thereafter satisfied, paid in full and the record thereof satisfied. That thereafter, on the 11th day of December, 1927, the said Towne Young and F. M. McDavid as Trustees for the Bankers Trust Company of Dallas, Texas, executed their Mortgage Deed to James D. Johnson, James H. Birch, Jr., Frank A. Potter, E. C. Smith, attorneys in fact and Trustees of D. L. Whitmore, J. H. Birch, H. G. McFadden, G. W. Carroll, F. C. Foster, James D. Johnson, John L. Bassett, John H. Folk, Sidney Thursby, R. A. Powers and W. G. French, at and for the sum of $88,075.48, as shown by Mortgage Record 65, page 244, of the records of Benton County, Arkansas. That thereafter said mortgagees filed a suit in the District Court of the United States in and for the Western District of Arkansas, and a decree of foreclosure on said mortgage was taken. That said judgment was thereafter assigned by said mortgagees in said mortgage as aforesaid, to J. L. Cunningham and R. F. Henderson under date of February 24, 1919. That there after and on March 12, 1919, the said J. L. Cunningham and R. F. Henderson sold and assigned said decree and judgment of the said United States District Court as aforesaid, to the Holland Banking Company of Springfield, Missouri. That thereafter and on December 27, 1922, said judgment was satisfied by W. N. Ufio who was Attorney in Fact for the said Holland Banking Company and authorized to satisfy said judgment in said United States District Court. That by reason thereof said mortgage from the said Towne Young and F. M. McDavid as Trustee for the Bankers Trust Company of Dallas, Texas, to the said James D.

Johnson, et al, was fully satisfied and so shown of record. That after the execution of said mortgage to the said James [illegible] Johnson, et al, as aforesaid, the said Bankers Trust Company of Dallas, Texas, by J. L. Cunningham as President and R. F. Henderson as Secretary, and Towne Young and F. M. McDavid as Trustees for said corporation, sold and conveyed by good and sufficient warranty deed all of said above described real estate, railroad and right of way, and all appurtenances thereunto belonging, to the Moark Tie & Timber Company, a corporation at that time organized and existing under the laws of the State of Arkansas with its principal place of business in the City of Rogers in said State. Said deed appearing of record in Deed Record 144, page 639 of the records of Benton County, Arkansas, and Deed record 52, page 22 and 32 inclusive of the records of Madison County, Arkansas, and Deed Record page ___ of the records of Washington County, Arkansas. That thereafter and on the 3rd day of June, 1921, the said Moark Tie & Timber Company by proper amendment to its articles of incorporation duly filed with the Secretary of State of the State of Arkansas in the City of Little Rock, and in the office of the County Clerk in and for Benton County, Arkansas, changed its name to Moark Tram Railway & Timber Company. That thereafter and on September 23, 1921, the said Moark Tram Railway & Timber Company, formerly Moark Tie & Timber Company, by W. E. Talley and R. F. Henderson who at said time were the duly elected, qualified and acting President and Secretary, respectively, of the said Moark Tram Railway & Timber Company, sold and conveyed said lands, railroad, right of way and all appurtenances thereto belonging to J. L. Cunningham and as above set forth, on September 27, 1921, the said J. L. Cunningham and wife, Henrietta E. Cunningham, made, executed and delivered to said Holland Banking Company their Mortgage Deed as above described and set forth; to secure the note herein described and set forth; which Mortgage Deed appears of record in Mortgage Record 80, page 58, of the records of Benton County, Arkansas, and Mortgage Record 20, at Pages 418, 419, 420 and 421, of the records of Madison County, Arkansas, and Mortgage Record Book ___, page ___ of the Mortgage Records of Washington County, Arkansas.

Plaintiff further states that on the 21st day of February, 1923, a resolution was passed by the Board of Directors of said Bankers Trust empowering the defendant J. Elmer Turner of Dallas, Texas as agent, and giving to him exclusive option to sell said above described real estate and railroad. That on the 29th day of May, 1923, the said J. [fol. 9] Elmer Turner entered into a contract with C. C. Briggs, defendant herein, to purchase said above described lands and railroad. That said contract was never carried out and was subject to and inferior to the mortgage held by the said Holland Banking Company and now owned by this plaintiff. That said resolution and contract as aforesaid now appears of record in Deed Record 166, page 198 of records of Benton County, Arkansas, and Deed Record —, Page — of the records of Madison County, Arkansas, and Deed Record — Page — of the records of Washington County, Arkansas.

Plaintiff further states that on April 18, 1924, the said J. L. Cunningham and wife Henrietta E. Cunningham sold and conveyed said lands to the defendant T. P. Perkins subject to the said mortgage indebtedness due the said Holland Banking Company in the sum of $79,000.00 with accrued interest thereon, which deed of conveyance appears of record in Deed Record 169, page 464 of the records of Benton County, Arkansas, and Deed Record 59, pages 248 to 252, inclusive, of the deed records of Madison County, Arkansas, and in Deed Record —, Page — of the records of Washington County, Arkansas. That said conveyance to the said T. P. Perkins was made subject to and is inferior to the Mortgage executed to the Holland Banking Company by the said J. L. Cunningham and wife, as aforesaid. That thereafter there were certain payments made on said mortgage to the said Holland Banking Company and note for which was given to secure by the said T. P. Perkins, the last payment on said note being on September 10, 1927, in the sum of $642.72. That there is now due and remaining unpaid on said note the sum of $62,885.49. That after the execution of said note as aforesaid, and said mortgage to secure same, the said Holland Banking Company became insolvent and was taken over for liquidation by the banking department of the State of Missouri, and for more than one year last past has been in process of liquidation. That on

or about the 20th day of October, 1928, J. E. Cahill as liquidating agent of the said Holland Banking Company of Springfield, Missouri, under and by virtue of an order, judgment and decree of the Circuit Court of Greene County, State of Missouri, sold, assigned, and set over said note and mortgage so executed by said J. L. Cunningham and wife to the said Holland Banking Company, to the plaintiff, and that the plaintiff is now owner thereof, and that said sale was duly approved by said Greene County Circuit Court in the County of Greene, State of Missouri, which has jurisdiction over the liquidation of the said Holland [fol. 10] Banking Company of the said City of Springfield and the State of Missouri. That there is now remaining due and unpaid on said note the said sum of $62,885.49, together with interest thereon at the rate of 7% to date of judgment. That all right of dower, homestead or equity of redemption of the defendants or either of them in and to said mortgage was specifically waived and the same was specifically waived by the said J. L. Cunningham and wife, Henrietta E. Cunningham at the time of the execution thereof. That the said J. L. Cunningham is now deceased; that the said Henrietta E. Cunningham is now in bankruptcy. That her said estate is being administered by the defendant B. K. Isaacs as Trustee in Bankruptcy for the United States District Court for the Northern District of Texas and the Ft. Worth Division thereof, and that since the purchase of said note and mortgage from the said liquidating agent of the said Holland Banking Company of the City of Springfield, Missouri, the defendant T. P. Perkins and wife, Mrs. T. P. Perkins has executed a deed covering said above described lands to the said defendant, B. K. Isaacs as such Trustee in bankruptcy, subject to the mortgage now held by this plaintiff, and that same has been filed for record in Deed Record —, page —, of the records of Benton County, Arkansas; Deed Record —, page — of the records of Madison County, Arkansas; Deed Record —, page — of the records of Washington County, Arkansas, but that said deed is subject to and inferior to the mortgage of the plaintiff, and that the note of the plaintiff has not been filed as a claim against the estate of said Henrietta E. Cunningham in said bankrupt court for the Northern District of Texas.

Wherefore, the premises being considered, plaintiff prays judgment against said lands in the sum of $62,845.49, together with all interest thereon to date of judgment, and if same be not paid within such time as may be fixed by this Court that the Commissioner of this Court be directed to sell said lands under the terms, manner and advertisement governing the sale of real estate under execution, and that out of the proceeds thereof that the judgment, interest and costs of the plaintiff be paid, and that all equity or right of redemption, homestead or dower of the defendants or either of them in and to said lands be cut off, foreclosed and forever bound; and for all other relief to which the plaintiff is entitled, either at law or in equity.

Hobbs Tie & Timber Company, by Duty & Duty, Its Attorneys.

[File endorsement omitted.]

[fol. 11] EXHIBIT "A" TO COMPLAINT

$29,000.00 September 27, 1921.

On the first day of October, 1924, value received for money loaned, I promise to pay to the order of Holland Banking Company, Seventy Nine Thousand Dollars, with interest on the same from date at the rate of 7 per cent per annum, payable semi annually until paid and evidenced until maturity of this note by six coupons of even date herewith, attached hereto. On failure to pay interest within ten days after due the holder may collect the principal and interest at once according to the tenor of certain deed of trust bearing even date herewith, given by J. L. Cunningham and H. E. Cunningham, payable to the order of the Holland Banking Company, Springfield, Missouri.

J. L. Cunningham.

(On back thereof:) Real estate bond. Without recourse pay to the order Hobbs Tie & Timber Co. Dec. 7, 1928. Holland Banking Company, by J. C. Cahill, Special Dep. Com. of Finance.

[File endorsement omitted.]

In Chancery Court of Benton County

[Title omitted]

Affidavit for Warning Order—Filed Dec. 12, 1928.

Comes John R. Duty and states that he is one of the attorneys for the plaintiff herein; that the plaintiff is a foreign corporation, and that he is authorized to make this affidavit, and *that* he *states that he* has made diligent inquiry as to the whereabouts of the defendants, and that to the best of his knowledge, information and belief all of [fol. 12] said defendants are non residents of the State of Arkansas.

John R. Duty.

Subscribed and sworn to before me this 11th day of December, 1928. Ollie Collins, Notary Public. My commission expires June 18, 1929. (L. S.)

[File endorsement omitted.]

In Chancery Court of Benton County

[Title omitted]

Warning Order

The defendants Bankers Trust Company, a corporation; J. Elmer Turner, C. C. Briggs, Henrietta E. Cunningham, T. P. Perkins and wife, Mrs. T. P. Perkins; and B. K. Isaacs as Trustee in Bankruptcy for the United States District Court in and for the Northern District of Texas and the Fort Worth Division thereof, and of the estate of Henrietta E. Cunningham, a bankrupt, are warned to appear in this court within thirty days and answer the complaint of the plaintiff in the above entitled cause.

Witness my hand and seal of said court this 12th day of December, 1928.

Marion Douglas, Chancery Clerk. (Seal.) Duty & Duty, Attorneys for Plaintiff. Robt. Butt, Attorney for Defendants.

[fol. 13] In Chancery Court of Benton County

[Title omitted]

Appointment of Counsel for Non-resident Defendants

Robt. Butt a regular licensed and practicing attorney of this bar, is hereby appointed to represent the non resident defendants Bankers Trust Company, a corporation; J. Edgar Turner, C. C. Briggs, Henrietta E. Cunningham, T. P. Perkins and wife, Mrs. T. P. Perkins; and B. K. Isaacs as Trustee in Bankruptcy for the United States District Court in and for the Northern District of Texas and the Fort Worth Division thereof, and of the estate of Henrietta E. Cunningham, a bankrupt, in the above entitled cause.

Witness my hand and seal this 12th day of December, 1928. Marion Douglas, Chancery Clerk. (Seal.)

In Chancery Court of Benton County

Appointment of Special Chancellor

Thursday morning, Jan. 10th, 1929, court met pursuant to adjournment, present and presiding the same as on first day, when the following proceedings were had and done, to wit:

Now, on this day the regular Chancellor being incapacitated on account of illness, an election was held and Paul Anderson, a regular licensed and practicing attorney of this bar was duly elected Special Chancellor. He duly qualified as such by taking the oath required by law and entered upon his duties.

[fol. 14] In Chancery Court of Benton County

[Title omitted]

Plea in Lieu of Demurrer or Answer. Filed Jan. 10, 1929

Pleading in lieu of demurrer or answer; and report. Comes Robert L. Butt, a regular licensed and practicing at-

torney of this bar, heretofore appointed by the clerk of this court to represent the non-resident defendants herein and states: that he has notified each of the defendants at his or her proper mailing address that the present action or suit was begun against him or her, and informed each such defendant of all knowledge he had which might be useful in preparing for their defense; and that he has twice so notified and informed the defendant Bankers Trust Company; that a resolute silence has been maintained by defendants, and that therefore this attorney for them can only ask that the plaintiff be held to the strictest positive proof of every material allegation of his complaint, and that any decree based thereupon be confined in its scope and effect to the very letter of the prayer of such complaint.

Robert L. Butt, Attorney for Non-resident Defts.

[File endorsement omitted.]

In Chancery Court of Benton County

[Title omitted]

Notice of Removal. Filed Jan. 10, 1929.

[fol. 15] To the Holdis Tie & Timber Company, and Messrs. Duty & Duty, its attorneys of record:

You are hereby notified that the defendant, B. K. Isaacs as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, will, on the 10th day of January, 1929, filed in the above entitled cause his petition and bond for removal of said cause to the District Court of the United States for the Western District of Arkansas at Fort Smith, a copy of said petition and bond being hereto attached.

Dated this the 9th day of January, 1929.

G. L. Grant, Wm. R. Watkins, Attorneys for B. K. Isaacs, as Trustee of the Estate of Henrietta E. Cunningham, Bankrupt.

II

That this is a controversy wholly between citizens of states other than that of which the plaintiff is a citizen, and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000.00.

III

tee in Bankruptcy of the Estate of Henrietta E. Cunningham, a Bankrupt, for the removal of this cause to the District Court of the United States for the Western District of Arkansas, Fort Smith Division, and it appearing to the Court that written notice of said petition and bond for removal has been duly given to the adverse party prior to the filing of the same, and it further appearing to the Court that the said defendant has presented and filed with his petition for removal a bond with good and sufficient sureties conditioned as required by law.

[fol 19] It is, therefore, ordered by the Court that said bond for removal be, and the same is hereby approved. It is further ordered that the said cause be, and the same is hereby removed to the District Court of the United States for the Western District of Arkansas, Fort Smith Division, and the Clerk of this Court is directed to forthwith prepare a certified copy of the record in this suit for entering in said United States District Court.

Paul Anderson, Special Judge Benton Chancery Court.

(Note by Clerk of Trial Court: Here follow in the transcript of removal pleadings and proceedings relating to an issue between E. M. Fowler and Hobbs Tie & Timber Company, which are omitted from this transcript on appeal).

Clerk's certificate to foregoing transcript omitted in printing.

[fol 20] In United States District Court

Equity. No. 485

Hobbs Tie & Timber Company

vs.

Bankers Trust Company et al.

Answer of B. K. Isaacs—Filed Feb. 11, 1929

To said Honorable Court:

Now comes B. K. Isaacs trustee in bankruptcy of the estate of Mrs. H. E. Cunningham, appearing herein in his

own behalf as such trustee, and for answer to the bill of complaint herein says:

I

This defendant has no personal knowledge of the execution of the note and mortgage described in plaintiff's petition or of the amount due and payable thereunder or of the amount that has been paid thereon, and for this reason is unable to either admit or deny the allegations of the bill of complaint in respect thereto.

II

This defendant has no personal knowledge of the allegations of the bill of complaint with respect to the matter therein alleged with reference to the Bankers Trust Company, its trustee the bankruptcy of the Ozark Land & Lumber Company, the execution of the notes and mortgages by the trustee of the Bankers Trust Company described in the bill of complaint; of the foreclosure proceedings thereon; of the satisfaction of the judgment in the foreclosure proceeding; or the transaction between the trustee of said Bankers Trust Company and the Moark Tie & Timber Company mentioned in the bill of complaint.

III

This defendant admits upon information the allegation with respect to the conveyance of the land in question to J. L. Cunningham and the conveyance by J. L. Cunningham and wife *to* T. P. Perkins; but, in connection with the conveyance of said land to the said T. P. Perkins, this defendant alleges that said conveyance was made to the said T. P. Perkins in trust only for the benefit of the said J. L. Cunningham and his wife, Henrietta E. Cunningham, for convenience in handling, as the plaintiff herein well knows and knew at the time it entered into negotiations for the purchase of the note in question from the liquidating agent [fol. 21] of the Holland Banking Company.

IV

Heretofore on the 14th day of September, 1928, the defendant herein, who is a resident and citizen of Fort Worth,

Tarrant County, Texas, was duly appointed as trustee in bankruptcy of the estate of Mrs. Henrietta E. Cunningham, David W. Cunningham and a co-partnership existing between said individual bankrupts doing business under the name of Banking House of Cunningham Brothers, at Palo Pinto, Texas, in a bankruptcy proceeding in the District Court of the United States for the Northern District of Texas, Fort Worth Division, and numbered 1540 in bankruptcy on the docket of said court. That upon his appointment aforesaid, the defendant duly qualified and since said date has been and now is the duly qualified and acting trustee in bankruptcy of the several estates of said bankrupts, and as such is entitled to all the rights of a trustee in bankruptcy under the Acts of Congress relating thereto.

That at the time of the filing of the petition in bankruptcy in said matter in the District Court of the United States for the Northern District of Texas at Fort Worth, the said bankrupt, Mrs. Henrietta E. Cunningham, was the owner of the lots, tracts, or parcels of land, lying and situated in the Counties of Benton, Madison and Washington, in the State of Arkansas, described in the bill of complaint.

That at said time, and for some time prior thereto, the legal title of said property had been conveyed by said bankrupt and her then deceased husband, J. L. Cunningham, to one T. P. Perkins as trustee (whose trust was not disclosed in said conveyance, however), for the purpose of permitting the said trustee to better handle, manage and control said property. That the conveyance to the said T. P. Perkins was executed by J. L. Cunningham and his wife, the bankrupt, Mrs. Henrietta E. Cunningham, on the 10th day of April, 1924. That thereafter and to wit, on the __ date of May, 1924, the said J. L. Cunningham died, leaving a last will and testament, wherein he devised and bequeathed to the said Mrs. Henrietta E. Cunningham, all property both real and personal, belonging to him at the time of his death. That said will was thereafter duly and legally admitted to probate in accordance with the laws of Texas by the Probate Court of Palo Pinto County, Texas. [fol. 22] That upon the appointment and qualification of the defendant herein as the trustee in bankruptcy of the said Mrs. Henrietta E. Cunningham, he becomes by virtue

of the premises invested with the title and all of the rights and interests of the said Mrs. Henrietta E. Cunningham, bankrupt, in and to the property hereinbefore described, and in recognition of that fact, the said T. P. Perkins, on the 17th day of October, 1928, made, executed and delivered to the defendant herein a deed, reciting the fact that said property had theretofore been conveyed to him by J. L. Cunningham and his wife by deed, dated April 18th, 1924, recorded in Book 169, page 464 of the Deed Records of Benton County, Arkansas, and in Book 59, page 248 of the Deed Records of Madison County, Arkansas; that the same was conveyed to him in trust for facility in handling the same, it not being the intention on the part of the grantors therein to part with their beneficial interest in said lands, and further reciting the fact that it was the desire of the said Mrs. Henrietta E. Cunningham that the said T. P. Perkins convey said property to her trustee in bankruptcy. That said deed was thereafter duly recorded in the office of the Circuit Clerk and Ex-officio Recorder of the County of Benton and State of Arkansas on the 29th day of October, 1928, in Record Book 192, page 247 of the Records of said County.

That the property hereinbefore described was duly listed as an asset of the estate of the bankrupt in said bankruptcy proceeding in the Northern District of Texas in the schedules filed by the Bankrupts therein on the 20th day of August, 1929, and upon his appointment and qualification as aforesaid, the defendant entered into possession of said premises and since that time, and at the present time, he has been in lawful and peaceable possession thereof as trustee in bankruptcy aforesaid.

That on or about the 7th day of December, 1928, the note executed by the said J. L. Cunningham as aforesaid, the payment of which was secured by said mortgage was transferred and assigned in a manner unknown to the defendant, but which upon information and belief he alleges was in this fashion, viz: That said Holland Banking Company of Springfield, Missouri, became insolvent and was taken over for liquidation by the Banking Department of the State of Missouri more than one year ago. That the liquidating agent of said Bank, about the 20th day of October, 1928, applied for and obtained an order from the Circuit

claimed to be due thereon, is due and sets up no defense to a foreclosure, by the plaintiff in this action, and does not state any other facts sufficient to constitute a defense against the action of the plaintiff herein, and that all relief asked for by the defendant trustee in bankruptcy, can be [fol. 26] preserved and taken care of in the distribution of the proceeds of the sale of the real estate, as described and set forth in the bill of complaint filed herein, and that all allegations made in the answer of said trustee in bankruptcy, and the relief prayed for should be taken up in this court at the time of distribution of said proceeds.

Wherefore, the plaintiff prays that all that part of the answer of the said B. K. Isaacs, Trustee, which seeks to delay foreclosure and sale be dismissed, and that the plaintiff have judgment and order of sale upon the pleadings herein, and for costs, and for all other relief to which the plaintiff is entitled.

Hobbs Tie & Timber Company, by W. N. Ivie, Duty & Duty, Its Attorneys.

In United States District Court

[Title omitted]

Amendment to Answer of B. K. Isaacs. Filed March 18, 1929

Comes now the defendant, B. K. Isaacs, Trustee in Bankruptcy, one of the defendants in the above entitled cause, and moves the Court to grant him leave to amend paragraph 4 of his original answer herein, by adding by way of interlineation after the end of the 2nd paragraph on the Fourth page of said answer the following, to wit:

"That on said 14th day of September, 1928, this defendant was authorized and directed to sell said property, by an order duly entered on said date by the Referee in Bankruptcy of said District Court of the United States for the Northern District of Texas, authorizing and directing this defendant to offer for sale and sell all, or any part, of the estates of the bankrupts aforesaid, at public, or pri-

vate, sale, for cash, or on terms and subject to, or free of liens."

G. L. Grant, Wm. R. Watkins, Attorneys for the Defendant, B. K. Isaacs, Trustee.

[fol. 27] In United States District Court

[Title omitted]

Order Granting Leave to Amend Answer of B. K. Isaacs, Trustee—March 18, 1929

This March 18, 1929, comes the plaintiff, by its solicitors, and comes the defendant B. K. Isaacs, Trustee in Bankruptcy, by his solicitors, and said defendant files motion for leave to amend his answer herein.

Said application coming on for hearing, the court being well and sufficiently advised in the premises doth sustain the same, and said defendant's answer is treated as amended as set out in said application.

Frank A. Youmans, Judge.

In United States District Court

Proof of Publication of Warning Order. Filed March 19, 1929

State of Arkansas
County of Benton:

I, James P. Shofner do solemnly swear that I am editor and publisher of the Rogers Daily News, a daily newspaper having a general circulation, published in the City of Rogers, Benton County, Arkansas, and do solemnly swear that the annexed notice was published for consecutive weeks in said newspaper, the said publications being made on the 14th day of December, 1928, 21st day of December, 1928, 28th day of December, 1928, 4th day of January, 1929.

James P. Shofner.

Subscribed and sworn to before me this 16th day of March, 1929. H. H. Miller, Notary Public. My commission expires March 3, 1932. (Seal.)

Warning Order

Hobbs Tie & Timber Company, a corporation, plaintiff, vs. Bankers Trust Company, a corporation; J. Elmer Turner, C. C. Briggs, Henrietta E. Cunningham, T. P. Perkins and wife, Mrs. T. P. Perkins; and B. K. Isaacs as Trustee in Bankruptcy for the United States District Court in and for the Northern District of Texas and the Fort Worth Division thereof, and of the Estate of Henrietta E. Cunningham, a bankrupt, defendants.

The defendants, Bankers Trust Company, a corporation; J. Elmer Turner, C. C. Briggs, Henrietta E. Cunningham, T. P. Perkins, and wife, Mrs. T. P. Perkins; and [fol. 29] B. K. Isaacs as Trustee in Bankruptcy for the United States District Court in and for the Northern District of Texas and the Fort Worth Division thereof, and of the estate of Henrietta E. Cunningham, a bankrupt, are warned to appear in this court within 30 days and answer the complaint of the plaintiff in the above entitled cause.

Witness my hand and seal of said court this 12th day of December, 1928.

Marion Douglas, Chancery Clerk. Duty & Duty, Attys., for Plaintiff. Robt. Butt, Atty. for Defendants.

(Rogers News, Dec. 14 21 28 Jan. 4)

In United States District Court

Decree—March 19, 1929

Now on this 19th day of March, 1929, this cause having been argued and submitted on March 18, 1929, and having come on for hearing upon the complaint of the plaintiff, the answer of the defendant B. K. Isaacs as Trustee in Bankruptcy for the District Court of the United States, Northern District of Texas and the Fort Worth Division there-

The Southeast Quarter of the Southeast Quarter, the West half of the Southeast Quarter and the Southwest Quarter of Section 29 in Township 19 North, of Range 27 West.

The North half of North half of Section 4 and the Northeast Quarter of Northeast Quarter of Section 8, Township 18 North, Range 28 West; also East half Northwest Quarter North half of Southwest Quarter and Northwest Quarter of Southeast Quarter Section 17; also Northeast Quarter of Southeast Quarter, Southwest Quarter of Northeast Quarter, West half of Southeast Quarter and East half of Southwest Quarter of Section 19; also East half of Southeast Quarter, Northwest Quarter of Southeast Quarter, Northeast Quarter of Southwest Quarter, Southwest Quarter of Northeast Quarter and Northwest Quarter of Section 20.

Also Northeast Quarter of Northeast Quarter, Southwest Quarter of Northwest Quarter and Southwest Quarter of Section 29; also Southeast Quarter of Southeast Quarter, North half of Southeast Quarter, West half of Northeast Quarter and Northwest Quarter Section 30 in Township 19 North, Range 27 West; also Southwest Quarter of Southeast Quarter Section 10; also Southwest Quarter of Southeast Quarter, Southwest Quarter of Northeast Quarter, and Southeast Quarter of Northwest Quarter Section 11; also West half of Southeast Quarter and Southwest Quarter Section 13; also Southwest Quarter of Southeast Quarter, East half of Southeast Quarter and Southwest Quarter of Section 14; also Southwest Quarter of Southwest Quarter and Southeast Quarter of Section 15; also Southeast Quarter of Southeast Quarter and West half of Northwest Quarter of Section 16; also Northeast Quarter of Section 17; also East half of Northeast Quarter and South half of Section 19; also West half of Northwest Quarter, Southeast Quarter of Northwest Quarter, South half of Northeast Quarter, [fol. 31] North half of Southwest Quarter, south half of Southeast Quarter, Northwest Quarter of Southeast Quarter Section 20; all of Section 21; all of Section 22; all of Section 23, except Southwest Quarter of Southeast Quarter; also West half of Northeast Quarter and West half of Section 24; also Northwest Quarter of Southeast Quarter, Northeast Quarter of Southwest Quarter and West half of Northwest Quarter Section 25; also Northeast Quarter of Northeast Quarter, Northwest Quarter of Northwest Quarter, South half of North half, South half of Southwest Quarter and Southeast Quarter of Section 26; also South half of Southwest Quarter and North half of Section 27; all of Section 28; also Northeast Quarter of Northeast Quarter, Southwest Quarter of Southwest Quarter, South half of North half and North half of South half of Section 29; also Southeast Quarter of Northeast Quarter, North half of Northeast Quarter and East half of Southeast Quarter Section 30; Southwest Quarter of Southwest Quarter, West half of Northeast Quarter, North half of Southwest Quarter and Northwest Quarter of Section 33; also Northeast Quarter of Northeast Quarter, South half of Northeast Quarter, North half of Northwest Quarter and ten acres off of East side of Southeast Quarter of Northwest Quarter Section 34; also West half of Northwest Quarter, Northeast Quarter,

of Northwest Quarter, North half of Northeast Quarter, Southwest Quarter of Northeast Quarter and East half of Northwest Quarter of Southeast Quarter of Section 35; also West half of Northwest Quarter of Section 36 all in Township 19 North, of Range 28 West; also East half of Southeast Quarter Section 24, Township 19 North, Range 29 West, and West half of Northeast Quarter and East half of the Northwest Quarter of Section 27, Township 19 North, Range 27 West.

The Northwest Quarter of Section 20 in Township 19 North, Range 27 West.

The Southwest Quarter of Southeast Quarter, Southeast Quarter of Southwest Quarter and Southwest Quarter of Southwest Quarter of Section 16, Township 19 North, Range 28 west, and Northeast Quarter of the Southeast Quarter of Section 35, the Northwest Quarter of the Southwest Quarter of Section 36, all in Township 19 North, of Range 28 West; also that part of the Northeast Quarter of Northwest Quarter containing 32.15 acres of Section 5; also Southwest Quarter of Northwest Quarter containing 42.22 acres of Section 6 in Township 18 North, of Range 28 W.

[fol. 32] Washington, County, Arkansas

The Southwest Quarter of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter Section 13, Township 18 North, of Range 28 West.

Madison County, Arkansas

The Southeast Quarter of the Southwest Quarter of Section 4, Township 18 North, Range 27 West.

The Northeast Quarter of the Southeast Quarter and the South half of the South half of Section 2, Township 17 North, Range 26 West.

The North half of the Southwest Quarter and the Southeast Quarter of Section 27, Township 19 North, Range 27 West.

The Southwest Quarter of the Southeast Quarter of Section 22, the Northwest Quarter of the Northeast Quarter, the South half of the Northeast Quarter and the South half of the Northwest Quarter of Section 27, Township 19 North, Range 27 West.

The Southeast Quarter of the Northwest Quarter of Section 10, Township 18 North, Range 27 West.

The North half of the Southwest Quarter and 39 acres more or less, of the Southeast Quarter of the Northwest Quarter of Section 3, Township 18 North, Range 27 West.

The West half of the Northeast Quarter, and the West part of the Northeast Quarter of the Northeast Quarter, containing 28 acres, of Section 11, Township 17 North, Range 26 West.

The East half of the Northwest Quarter, the Southwest Quarter of the Northeast Quarter and the Northeast Quarter of the Southwest Quarter of Section 17, Township 18 North, Range 27 West.

The Northeast Quarter of the Southwest Quarter and the South half of the South half Section 2, the Southeast Quarter Section 3, the Northeast Quarter Section 10, the Northeast Quarter of the Northwest Quarter and the West Half of the Northeast Quarter Section 11, Township 17 North, Range 26 West, one acre in the Northeast Quarter of Section 10, Township 17, Range 26, reserved.

The West half of the Northeast Quarter and the North half of the Southeast Quarter of Section 15, Township 18 North, Range 26 West.

[fol. 33] The South half of the Northwest Quarter of Section 35, Township 19 North, Range 27 West.

The West half of the West half of Section 21, and the West half of the Northwest Quarter of Section 28, Township 19 North, Range 27 West.

The Northwest Quarter of the Southwest Quarter and the West half of the Northwest Quarter of Section 4, Township 18 North, Range 27 West.

The South half of the Northeast Quarter and the Southeast Quarter Section 27, the Northeast Quarter of the Northeast Quarter Section 34 and the Northwest Quarter of the Northwest Quarter Section 35, Township 19 North, Range 27 West.

The Southwest Quarter of the Northwest Quarter and the East half of the Northwest Quarter of Section 9, Township 18 North, Range 27 West.

The South half of the Northwest Quarter of Section 27 Township 19 North, Range 27 West.

Together with a certain line of railroad and right-of-way commencing at a point in Benton County at the Town of

Monte Ne in said County, and extending in an easterly direction for a distance of approximately five miles, together with all rails, ties, bridges, and other equipment.

The Court further finds that on December 12, 1917 that Towne Young and F. M. McDavid as Trustees for the Bankers Trust Company, a corporation of Dallas, Texas, became the owners of said lands, railroad and right-of-way, and all property described herein, and as above set forth, by virtue of a certain sale from the bankrupt court of the United States in and for the Western District of Arkansas and the Ft. Smith Division thereof, in the matter of the Ozark Land & Lumber Company, a bankrupt, being No. 456 in Bankruptcy, wherein Perry N. Clark was Trustee, and under and by orders of said bankrupt court the property was sold by the said Perry N. Clark and the said Towne Young and F. M. McDavid as Trustees became the purchasers thereof, and received a deed from the said Perry N. Clark as such Trustee in Bankruptcy in and for said United States District Court for the Western District of Arkansas and the Ft. Smith Division thereof, and that thereafter the said Towne Young and F. M. McDavid as Trustees for the said Bankers Trust Company of Dallas, Texas executed a certain mortgage deed in the sum of $16,667.00 on said lands, railroad and right-of-way to the Holland Banking Company of Springfield, Missouri, which [fol. 34] appears of record in Mortgage Record 65 at Page 242, but that said mortgage was thereafter satisfied, paid in full and the record thereof satisfied. That thereafter, on the 11th day of December, 1917, the said Towne Young and F. M. McDavid as Trustees for the said Bankers Trust Company of Dallas, Texas, executed their mortgage deed to James D. Johnson, James H. Birch, Jr., Frank A. Potter, E. C. Smith, Attorneys-in-fact and Trustees of D. L. Whitmore, J. H. Birch, H. G. McFadden, G. W. Carroll, F. C. Foster, James D. Johnson, John L. Bassett, John H. Folk, Sidney Thursby, R. A. Powers and W. G. French, in and for the sum of $88,075.48, as shown by Mortgage Record 65, Page 244 of the records of Benton County, Arkansas. That thereafter said mortgagees filed a suit in this Court and a decree of foreclosure on said mortgage was taken. That said judgment and decree was thereafter assigned by said mortgagees in said mortgage

as aforesaid to J. L. Cunningham and R. F. Henderson under date of February 24, 1919, that thereafter and on March 12, 1919 the said J. L. Cunningham and R. F. Henderson assigned said decree and judgment of the [illegible] to the Holland Banking Company of Springfield, Missouri; that thereafter and on December 27, 1922 said judgment was satisfied by W. N. Ivie who was Attorney in Fact for the said Holland Banking Company and authorized to satisfy said judgment, that by reason thereof said mortgage from the said Towne Young and F. M. McDavid as Trustees for the Bankers Trust Company of Dallas, Texas to the said James D. Johnson, et al, was fully satisfied, as shown on record. That after the execution of said mortgage to the said James D. Johnson, et al, as aforesaid, the said Bankers Trust Company of Dallas, Texas by J. L. Cunningham as President and R. F. Henderson as Secretary, and Towne Young and F. M. McDavid as Trustees for said corporation, sold and conveyed by good and sufficient warranty deed all of the above described real estate, railroad and right of way and all appurtenances thereto belonging to the Moark Tie & Timber Company, a corporation, at that time organized and existing under the laws of the State of Arkansas and with its principal place of business in the City of Rogers in said State; that said deed appears of record in Deed Record 144, Page 639, of the records of Benton County, Arkansas, and Deed Record 52, Page 22 to 32 inclusive, of the records of Madison County, Arkansas, and also of record in the deed records of Washington County, Arkansas. That thereafter and on the 3rd day of June, 1921 the said Moark Tie & Timber Company, by proper amendment to its articles of incorporation, duly [fol. 35] filed with the Secretary of State of the State of Arkansas in the City of Little Rock, and in the office of the County Clerk in and for Benton County, Arkansas, changed its name to Moark Tram Railway and Timber Company; that thereafter and on September 23, 1921 the said Moark Tram Railway & Timber Company by W. E. Talley and R. F. Henderson who at said time were the duly qualified and acting President and Secretary, respectively, of the Moark Tram Railway & Timber Company sold and conveyed said lands, railroads, right-of-ways and all appurtenances thereunto belonging to J. L. Cunningham as

above set forth on September 27, 1921 and that the said J. L. Cunningham and wife Henrietta E. Cunningham made, executed and delivered to the said Holland Banking Company their Mortgage Deed as above described and set forth and to secure the note herein described and set forth, which Mortgage Deed appears of record in Mortgage Record 80, page 48, of the records of Benton County, Arkansas, and Mortgage Record 20, Pages 418, 419, 420, and 421 of the records of Madison County, Arkansas, and also in the Mortgage Record of Washington County, Arkansas.

The Court further finds that on the 21st day of February, 1923 a resolution was passed by the Board of Directors of the defendant Bankers Trust Company, empowering the defendant J. Elmer Turner of Dallas, Texas as agent and attorney-in-fact to effect a option to sell said above described real estate and railroad; that on the 29th day of May, 1923, the said J. Elmer Turner entered into a contract with the defendant C. C. Briggs to purchase said above described lands and railroad; that said contract was never carried out and was subject to and inferior to the mortgage executed to the said Holland Banking Company and now held by the plaintiff herein; that said resolution and contract as aforesaid, appears of record in the office of the Recorder in and for Benton, Madison and Washington Counties, Arkansas.

The Court finds that on April 18, 1924 the said J. L. Cunningham and wife, Henrietta E. Cunningham sold and conveyed said lands, railroad and right of way covered by the mortgage of the plaintiff herein to the defendant T. P. Perkins but said deed of conveyance was subject to and inferior to the indebtedness due the Holland Banking Company, at that time represented by the note sued on in this action and with the accrued interest thereon; that said deed of conveyance now appears of record in Deed Record 109, Page 464, of the records of Benton County, Arkansas, and Deed Record 59, Pages 248 to 252 inclusive, of the deed records of Madison County, Arkansas, and of record [fol. 36] in the deed records of Washington County, Arkansas. That said deed of conveyance from said Cunningham and wife to the said T. P. Perkins was in all things subject to and inferior to the mortgage executed to the

said Holland Banking Company by the said J. L. Cunningham and wife as herein set forth.

The Court finds that thereafter there were certain payments made on said mortgage to the Holland Banking Company and the note for which same was given to secure; that the last payment made on said note was on September 10, 1927 in the sum of $642.72, made by the said T. P. Perkins, at that time the owner of the equity of redemption.

The Court finds that after the execution of said note as aforesaid and the mortgage to secure same, the said Holland Banking Company became insolvent and was placed in charge of the State Banking Department of the State of Missouri for liquidation and that on or about the 20th day of October, 1928, that the said State Banking Department of the State of Missouri, under and by virtue of an order, judgment and decree of the Circuit Court of Green County in the State of Missouri, sold, assigned and set over said note and mortgage so executed by the said J. L. Cunningham and wife to the said Holland Banking Company to the plaintiff Hobbs Tie & Timber Company, a corporation organized and existing under the laws of the State of Delaware, but admitted to do business as a foreign corporation in the State of Arkansas, and that said corporation is now the owner of said note and the security.

The Court finds that there is now due and remaining unpaid on said note, together with principal and interest, the sum of $956,020.65.

The Court finds that all right of dower, homestead or equity of redemption of the makers of said mortgage securing said note, was specifically waived by them at the time of the execution thereof, and under the Act of the General Assembly of the State of Arkansas, approved May 8, 1899; that said J. L. Cunningham is now deceased; that the said Henrietta E. Cunningham is now in bankruptcy; that her said estate is being administered by the defendant B. K. Isaacs as Trustee in Bankruptcy for the District Court of the United States for the Northern District of Texas and the Ft. Worth Division thereof, and that the plaintiff is not seeking any personal judgment on said note against said Trustee in Bankruptcy of the estate of the said Henrietta E. Cunningham. That after said sale to

the said Hobbs Tie & Timber Company as aforesaid, the [fol. 37] said T. P. Perkins and wife executed a deed covering said lands, railroad, right-of-way and appurtenances thereto belonging to the said B. K. Isaacs as such Trustee in Bankruptcy, but that said deed was subject to and inferior to the mortgage held by the plaintiff, and that said indebtedness due on said promissory note as aforesaid to the plaintiff is long past due and remains unpaid, and that the plaintiff is entitled to a judgment and decree of foreclosure, against the lands and property above described.

It Is Therefore Considered, ordered, adjudged and decreed by the Court that the plaintiff do have and recover of and from said above described real estate, railroad, railroad right-of-way and appurtenances thereunto belonging, the said sum of $66,020.65, together with all of its cost herein, and that said judgment bear interest from this date at the rate of 7%, and that the same is declared a lien against said above described real estate, railroad, railroad right-of-way, and appurtenances thereunto belonging and described in said mortgage, and that the Special Master of this Court hereinafter designated and appointed, be and he is hereby directed if said judgment, interest and costs is not paid within ten days from this date, to proceed to sell said lands, railroad, railroad right-of-way and appurtenances thereunto belonging above described at public sale, at the court house of Benton County, at Bentonville, Arkansas, after first giving notice of such proposed sale. Said notice of sale shall be published once a week for four weeks prior to such sale in a weekly newspaper printed, regularly issued, and having a general circulation in Benton County, Arkansas, and also published once a week for four weeks in a newspaper printed, regularly issued and having a general circulation in Madison County, Arkansas, and of the proceeds of said sale, the same be applied to the satisfaction of the judgment, interest and costs of the plaintiff herein, and if there be a surplus over and above the amount to pay said judgment, interest and costs, that the same be turned over after all expenses have been paid, to the said B. K. Isaacs as Trustee in bankruptcy for the state of the said Henrietta E. Cunningham as herein specified.

G. T. Sullins of Fayetteville, Arkansas, is hereby appointed by this Court as Special Master to carry out this decree and to make said sale as herein ordered, and that [fol. 38] this cause be continued for report of said Special Master and for such further orders as may be proper.

Frank A. Youmans, Judge.

In United States District Court

Petition for Appeal—Filed April 10, 1929

To said Honorable Court:

Feeling himself aggrieved at the order and decree of this Honorable Court, entered herein on the 19th day of March, 1929, dismissing his answer and rendering judgment on the pleadings in favor of the plaintiff, the defendant B. K. Isaacs, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, respectfully prays the allowance of an Appeal from said order to the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, where the errors of this court may be examined and corrected. Your petitioner further prays that, as he is a trustee in bankruptcy, his appeal be allowed without requiring him to furnish security for costs thereof; and that the court in allowing same, grant a supersedeas of its judgment of foreclosure and sale, likewise without security, as is provided in the Acts relating to Bankruptcy.

G. L. Grant and Wm. R. Watkins, Attorney for the Defendant, B. K. Isaacs, as Trustee in Bankruptcy of Henrietta E. Cunningham, Bankrupt.

In United States District Court

Order Allowing Appeal—April 10, 1929

On this the 10th day of April, 1929, came B. K. Isaacs as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, and filed his petition for the allowance of an appeal from the decree entered herein on the

19th day of March, 1929, together with his assignment of errors and prayer for reversal, upon consideration whereof;

It is ordered, that said petition for appeal be, and it is hereby allowed, and, as the said B. K. Isaacs is a trustee in bankruptcy, it is further ordered that he be, and is hereby permitted to prosecute the same without bond for costs.

It is further ordered that proceedings for the enforcement of the decree entered herein be not stayed during the [fol. 39] pendency of said appeal as prayed for by said trustee, without a supersedeas bond, to the refusal of which stay he excepts and with permission of the court files an additional assignment of error at the time of allowance of the appeal.

Frank A. Youmans, United States District Judge.

In United States District Court

Assignment of Errors—Filed April 10, 1929

Now comes the defendant, B. K. Isaacs, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, and files the following assignment of errors upon which he will rely in the United States Circuit Court of appeals for the Eighth Circuit, for reversal of the decree entered herein on the 9th day of March, 1929:

1. The court erred in sustaining the motion of the plaintiff to strike out and dismiss the answer of this defendant, and in thereupon entering judgment on the pleadings.

2. The court erred in ordering and decreeing the foreclosure and sale of the property in controversy herein.

Wherefore, said defendant prays that the decree aforesaid be reversed.

G. L. Grant and W. R. Watkins, Attorney for the Defendant, B. K. Isaacs, as Trustee in Bankruptcy of Henrietta Emma Cunningham, Bankrupt.

In United States District Court

Additional Assignment of Errors—Filed April 10, 1929.

Now comes the defendant B. K. Isaacs, as Trustee in Bankruptcy of the Estate of Henrietta E. Cunningham, Bankrupt, and files the following additional assignment of error, with permission of the court, at the time of the allowance and filing of his petition for appeal herein, to-wit:

3. The court erred in refusing to allow his appeal herein without bond for damages being furnished as required of [fol. 40] other appellants in ordinary cases, in order to supersede the operation and enforcement of the decree appealed from.

G. L. Grant and Wm. R. Watkins, Attorney for Defendant B. K. Isaacs, as Trustee in Bankruptcy of Henrietta E. Cunningham, Bankrupt.

In United States District Court

Precipe for Transcript—Filed April 10, 1929

The parties to the appeal in the above entitled cause, hereby agre that the Clerk may, and he is hereby requested to incorporate in the record to be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit, the following papers, to-wit:

1. Transcript of record from State Court (omitting descriptions and formal parts.)

2. Answer of B. K. Isaacs, including amendment filed March 18th, 1929.

3. Motion to dismiss answer of defendant, B. K. Isaacs, and for judgment on pleadings.

3. Decree.

4. Petition for Appeal.

5. Order of allowance thereof.

6. Assignment of errors.

7. This præcipe.

8. Clerk's Certificate.

9. Proof of Publication of Warning Order.

And that there shall be attached to and sent up with the record the original writ of error and citation on appeal.

G. L. Grant, W. R. Watkins, Attorneys for B. K. Isaacs. —— ——, Attorney for Hobbs Tie & Timber Company.

[fols. 41 & 42] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 43] In United States Circuit Court of Appeals for the Eighth District

No. 8584

B. K. Isaacs, as Trustee in Bankruptcy of Henrietta E. Cunningham, Bankrupt, Appellants,

vs.

Hobbs Tie & Timber Company, Appellee.

Appeal from the United States District Court for the Western District of Arkansas, Fort Smith Division

Motion for Supersedeas or Stay of Decree Appealed From —Filed April 18, 1929.

To said Honorable Court:

Come now the Appellant and respectfully represents to the court:

I.

This suit was instituted in the Chancery Court of Benton County, Arkansas, by the appellee against the appel-

lant and others to foreclose a mortgage given by the de- [fol. 44] ceased husband of the bankrupt on 12000 acres of timber land in Arkansas, devised to the bankrupt by her husband and owned by her at the time of her adjudication in bankruptcy, which land came into the possession of appellant as trustee of bankruptcy, several months prior to the filing of the suit.

Appellant removed the cause to the district court on the ground of diversity of citizenship where he answered, setting up his appointment and qualification as trustee, that he was in possession of the property prior to the institution of the suit, that it was instituted without the consent of the court of bankruptcy, that the general creditors have a substantial equity in the property, to-wit, $40,000.00, and that an order of sale of said property had been entered by the bankruptcy court prior to the institution of this suit, by reason of which the court had no authority to entertain the foreclosure proceedings and order a sale of the property.

The appellee filed a motion to dismiss the answer and for judgment on the pleadings. The motion to dismiss the answer was treated as a motion to strike, and on hearing the motion was granted and a decree entered establishing the appellee's debt and lien, foreclosing the same and ordering the property sold by a special master on thirty days' notice after the expiration of ten days from the date of decree which was March 19, 1929. The special master has fixed May 6 as the sale date.

[fol. 45] II

The appeal herein was duly allowed and the court permitted the appellant to prosecute the same without cost bond, but refused to stay the foreclosure sale pending the appeal or to order that the allowance thereof should operate as a supersedeas.

Appellant excepted to this ruling and with permission of the court at the same time filed an additional assignment of error challenging the correctness of the ruling of the court in denying the stay and supersedeas.

III

This being an appeal by a truste in bankruptcy, the appellant as such trustee respectfully represents that he is

entitled to prosecute the same without bond for damages and that the proceedings for the sale of the property in controversy should be stayed by this court under the provision of Section 25 of the Bankruptcy Act and Revised Statutes 1001. (Title 11, U. S. C. A. Section 48 (b), and title 28, U. S. C. A., Section 870), as fully shown in the Argument hereto attached as a part of this motion.

From the foregoing statement of the case it is apparent that the sale of the property involved will result in great injury to the bankrupt estate, and believing as he does that no bond is required of him to supersede the enforcement of the decree appealed from, the appellant feels that [fol. 46] he would not be justified in putting the estate in jeopardy on account of such bond or of incurring the expense incident to securing a bond.

Wherefore, Premises Considered, appellant prays that upon consideration of this motion an order be entered herein, staying the enforcement of the decree appealed from during the pendency of this appeal.

Argument and Authorities

It is apparent that the only question involved on the appeal is:

May a mortgagee foreclose his mortgage even in a Federal Court where the property on which he has a lien is in custody of a bankruptcy court, and the trustee has charge thereof, without the consent of the Bankruptcy Court?

We say not, under the numerous decisions of this court, and of the Supreme Court. U. S. F. & G. Company v. Bray, 225 U. S. 205; Knauth v. Latham & Company, 242 U. S. 426; Taylor v. Voss, 271 U. S. 176; Lazarus v. Prentice, 234 U. S. 263; Acme Harvester Company v. Beekman, 222 U. S. 300; First Trust Company v. Baylor, 1 F. (2d) 24; Re Holstein Harvey, Inc., 26 F. (2d) 798; First Savings Bank & Trust Company v. Butler, 282 F. 866; Britton v. Western Iowa Company 9 F. (2d) 488, 490; and see Re Patterson Lumber Co., 247 Fed. 578, per Sanford, D. J., [fol. 47] in which foreclosure proceedings have been enjoined under similar circumstances, but we pre-termit a discussion of that question here.

On this motion the only question is:

Can a trustee in bankruptcy appeal and have a stay of the judgment without giving a supersedeas bond, and if so, where the lower court has refused to grant the stay, may this court do so?

The Bankruptcy Act (11 U. S. C. A., Section 48 (b)) provides:

"Trustees shall not be required to give bond when they take appeals or sue out writs of error."

The general provisions relating to appeals and writs are as follows:

Title 28, Section 870:

"Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a circuit court of appeals, either by the United States or by direction of any department of the Government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against [fol. 48] the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted." (R. S., Section 1001; March 3, 1911, c. 231, Sections 118, 289, 26 Stat. 1131, 1167.)

Title 28, Section 869:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." (R. S., Section 1000.)

Title 28, Section 874:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judg- [fol. 49] ment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days. (R. S., Section 1007; February 18, 1875, c. 80, Section 1, 18 Stat. 318.)

So far as we have been table to find, the question has never been directly presented to any court. It was indirectly presented in the Ninth Circuit in Pacific Coast Casulty Company v. Harvey, 250 Fed. 952, and without analysis or discussion, Section 48b of the Bankruptcy Act was construed adversely to our contention. In that case the court say:

"It is true that under Section 25c of the Bankruptcy Act (now 11, U. S. C. A. 48b), the trustee was not required to give bond when he took the appeal or sued out a writ of error; but a supersedeas pending the appeal, though an auxiliary, was a separate matter. The appellate court could undoubtedly have reviewed the proceedings, even though appellant had failed to give any bond to supersede the proceedings on a judgment or decree entered against him. Logan v. Goodwin, 104 Fed. 494. Revised Statutes, Section 1000 (28 U. S. C. A., 869), is the general provision on appeal, for costs and damages or for costs only, according to whether or not supersedeas is obtained; but we do not think that Section 25c (11 U. S. C. A., 48b) relieving a trustee in bankruptcy from giving bond on appeal or writ of error, relieves him from the obligation to give such a bond as is required of any litigant where supersedeas is [fol. 50] desired. In Re Barrett, 132 Fed. 362."

In that case the issue was as to whether a surety on a bond given in the form of supersedeas bond was liable for costs adjudged against a trustee in bankruptcy, so that what was said with reference to supersedeas is really no more than dicta. The case of Barrett, 132 Fed. 362, cited in the opinion, did not involve the question at all. There a receiver in bankruptcy had instituted a suit in equity for injunction and other relief, and a motion was filed to require him to give a cost and injunction bond as in other cases. It was held by the District Court he should not be required to do so. The ruling in the Pacific case for which it is cited as authority was not decided or discussed. So far as we have found the case has never been cited by any other court on the point at issue.

When we look to the nature and purpose of Section 48-b, there can be little doubt of the intention of Congress. Trustees in bankruptcy are officers of the court appointing them. In Re Cadenas & Coe, 178 Fed. 158; In Re Howard, 130 Fed. 1004, 135 Fed. 721. Their office is created by Congress (11 U. S. C. A., 61: "The offices of referee and trustee are created"). They have powers defined by the Act (11 U. S. C. A., 75) and a title conferred by it upon them (11 U. S. C. A., 110). Property thus acquired is held by them by virtue of their office, in custodia legis, U. S. F. & G. Company v. Bray, 225 U. S. 205; Robertson v. Howard, 229 U. S. 254; [fol. 51] In Re Sheinman, 14 Fed. (2) 323; In Re Eppstein, 156 Fed. 42. Clearly their rights, powers and relation to the property is of a higher order than possessed by any other custodian or receiver that could be appointed by the judicial branch of the government.

From the standpoint of creditors and those with whom the trustee may litigate, their rights and the trustee's are fixed as of the adjudication. The former are entitled to a distribution of the estate under principles fixed by the act, the latter is entitled to enforce this distribution and to protect and recover the estate. No provision of the act or any other act, contemplates that a creditor can by virtue of any action by the trustee secure a greater benefit from the estate than is contemplated under its provisions for the distribution of it. For instance, the trustee may contest a claim and on losing appeal, but, if he gives a supersedeas against the collection of a dividend, as a supersedeas is ordinarily

given, the estate would, the trustee being defeated on the appeal, be liable for the entire claim. A more apt illustration is afforded by the facts of this case. Here, under the provisions of the act and all the decisions the trustee is seeking to deprive the appellee of the remedy of foreclosing without the consent of the bankruptcy court, on property in custodia legis. This right has been denied him and he appeals. It is said he has no right to stay the sale without a supersedeas bond. Now, what damages could be here [fol. 52] allowed the appellee, a creditor, whose rights are fixed by the act, without running afoul the act itself. The estate is not personally liable for a deficiency under the mortgage should there be one, but a supersedeas bond could possibly make it so, notwithstanding the trustee obviously has no power or authority to assume an indebtedness on behalf of the estate which it would not otherwise owe. A supersedeas bond in a mortgage foreclosure is fixed at an amount sufficient to cover costs of the appeal and for delay if the appeal is without justification. (Omaha Hotel Company v. Kountze, 107 U. S. 378.) The theory being, as the court in that case, after an extended review of the authorities, say:

"In view of the authorities, therefore, as far as they go, if the bond in the present case is to be regarded as important nothing more than the bond prescribed by the statute, it is clear that it did not operate as security for the original decree, nor for the interest which accrued pending the appeal, nor, by consequence, for the balance of these amounts, or either of them, after applying the proceeds of the mortgaged property. The item of $530 costs unpaid by the defendants in the original foreclosure suit, came under the same head, being part of the original decree, to pay which the lands were ordered to be sold. The only ground of recovery upon the bond could be: 1, the depreciation of the property in market value pending the appeal; or 2, its deterioration by waste, or want of repair, or the accumulation of taxes or other burdens; or 3, the use and detention of the property [fol. 53] pending the appeal, that is, the rents and profits; or 4, the non-payment of the costs of the appeal, which accrued in this court; but the special verdict does not find that these costs were unpaid.

"If depreciation in market value can ever be laid as cause of legal damages on a bond in error, which we greatly doubt, it cannot be done in this case, because it is found by the special verdict that the property considerably increased in value pending the appeal. Deterioration by waste, etc., is a very different matter; but that is equally out of the question in this case, as no deterioration is shown. The defendants paid the taxes and insurance, and kept the property in repair. The principal question for consideration, therefore, is whether the plaintiffs were entitled to recover the rents and profits, or damages for the use and detention, as it is otherwise called.

"We have seen that even in ejectment, it has at least been questioned by this court whether the bond in error covers rents and profits accruing pending the writ. And yet there is a material difference between the case of ejectment and a suit for the foreclosure of a mortgage.

"The difference is this: in ejectment, the property of the land is in question, and if the plaintiff has the right, he is entitled to immediate possession and to the perception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him. Every dollar, or dollar's worth, is so much of the plaintiff's [fol. 54] property of which he is deprived. And the same is true in dower. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. This is not only the common law, but it is the express statute law of Nebraska, which declares that 'In the absence of stipulations to the contrary, the mortgagor retains the legal title and right of possession.' The plaintiff, in this case, was not entitled to possession, nor, to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing, the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him, as of right. The taking of the rents and profits prior to the sale does not

injure the mortgage, for the simple reason that they do not belong to him. Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not covered by reasonable insurance, and the like, probably might also be fairly covered by the bond. But preception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale [fol. 55] made accordingly.

"The mere delay of the sale for the purposes of an appeal does not operate to the legal injury of the mortgagee. It does not suspend execution for the debt; he has no right to such an execution by the decree of foreclosure and sale. It is not a decree against the person, and cannot be enforced by an execution against goods and lands generally. It is simply a decree for the sale of the land mortgaged, in order that the proceeds may be applied to the debt. The amount due is ascertained by the decree, it is true, but only for the purpose of determining the amount of charge on the land. The debt may be prosecuted by a personal action against the debtor, and this may be the defendants in the suit or some other person. The rule of court by which a personal decree may, in some cases, be entered upon against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land have been applied, is a recent rule intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree for foreclosure and sale.

"It often happens that the debt is not fully ascertained when a decree for sale and foreclosure is made; as where there are many outstanding bonds which have to be called in and verified. The sale, in such cases, is frequently made in advance, and the proceeds brought into court for distribution amongst those who may appear to be entitled thereto; all which shows that a decree of foreclosure is a [fol. 56] very different thing from a personal decree or judgment for the debt.

"As it is a specific thing, the land itself, and not the rents and profits, that constitutes the pledge, the delay

of sale caused by the appeal, as before said, deprives the mortgagee of no legal right. It may be an incident of disadvantage or inconvenience, but in our judgment it is not a legal damage contemplated by the appeal bond. We are aware that a contrary view has sometimes been taken at the circuit; but upon a full consideration of the subject, we have come to the conclusion now expressed. The chances of actual deterioration and waste in certain classes of property are so great, that a bond in a considerable amount may well be required; and if actual deterioration and waste supervenes, the amount may properly be recovered.

"In addition to these general considerations, a careful examination of the 29th rule will show that in cases like the present, it does not, in terms at least, contemplate security for the use and detention of the property pending the appeal. The words are 'indemnity in all such cases (where the property in controversy necessarily follows the event of the suit) is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, etc.' 'The sum recovered for use and detention,' here referred to, means the sum recovered in the original judgment or decree, such as damages and mesne profits in ejectment, damages in dower, and replevin, etc., and the [fol 57] 'just damages for delay' refers to those damages arising from the delay occasioned by the proceedings in error or appeal which are properly a legal damage to the party delayed. We are thrown back, therefore, to a consideration of the nature of the particular case, to ascertain what those legal damages properly are. The words 'use and detention' do not assist us, as they relate to a cause of recovery in the original judgment.

"There is another consideration which relieves the conclusion which we have reached from any supposed hardship or injustice to mortgagees. Courts of equity always have the power where the debtor is insolvent, and the mortgage property is an insufficient security for the debt, and there is a good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver, and preserve not only the corpus, but the rents and profits for the satisfaction

of the debt. When justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection. There is no necessity, therefore, in order to protect him from injury, that a party in order to have the benefit of an appeal, should be obliged to give security to account for the intermediate rents and profits of his own property." (Rule 29 is now Rule 33 and is the same as Rule 13 of this court.)

Is it possible that a trustee whose estate is not otherwise liable for debt, or interest, or a penalty or waste, [fol. 58] could be held therefore on an ordinary assumption of it? When we consider the law itself there is no ground, for such a view. The delay thus caused by the trustee, is a delay of the law itself, for which no one interested should suffer or gain. The estate should not be penalized for the act of the trustee in the performance of his duty and his opponent should not gain by it an advantage the act does not in spirit or tenor afford. We know of no principle of bankruptcy law under which an estate is being actually sold to pay the creditors, whereby the creditors can get damage for waste or the like, from the court of bankruptcy itself for delay, or anything else, from the bankruptcy court itself.

We suggest that as in the ordinary case of receivership, judgments against a trustee should not be executed upon property of the trustee, but certified to the court having custody of the property for observance. This done, no supersedeas would be necessary, for it must be assumed the court having such custody will do its duty. The creditor is certainly not entitled to additional security for his claim simply because of the appeal.

The foregoing general observations as to the nature and character of a supersedeas, and as to the trustees position make it clear that even without the significant mandate of Section 48b it is doubtful if a bond to stay a decree appealed from by a trustee should or could be required. [fol. 59] When, however, we consider that section in conjunction with the other sections quoted above, relative to bonds on appeal, it is perfectly clear that the trustee should be treated as being within the excepted classes named. He appeals, not so much in his own right, as to

vindicate and secure an enforcement of the mandates of the bankruptcy act. His office requires it, as much so as though he were the Comptroller of Currency, Secretary of the Treasury, of State, the Attorney General, or any other Governmental Department head. His office places him in the position of an agent of the Government for the enforcement of the Bankruptcy Act. And the enforcement of that law is as much a part of the plenary power and duty of the government as any other. The trustee's office is created for that purpose, with as much dignity attaching to it as to any other office of the government, so far as Congress has treated or could treat it. Section 870 of Title 28 exempts governmental agencies from the operation of Section 869 and 874. Receivers of Federal courts are exempt under its provisions. Central Trust Co. v. St. L., etc., R. Co., 41 Fed. 551; Pepper v. Bank, 125 Fed. 822; Bank v. Mixter, 114 Fed. 463, although the contrary has been held by a New York circuit court. Peatt v. Advance, 90 Fed. 772. The trustee is under the same head. And, when we consider Title 11, Section 48b, which clearly exempts him from giving "bond" on appeals or writs of error, in the light of the purposes of the act as a whole, [fol. 60] and in connection with Title 28, Section 869, 870 and 874, there is no escape from the conclusion that the trustee is exempted from giving any sort of bond whatsoever. To say he need not give a bond for costs, but must give a supersedeas bond under this section is a contradiction of the Statute. There are only two classes of bonds on appeal. Neither is jurisdictional, as held in Rederiaktiebolazet Amie v. Transp. Company, 245 Fed. 282, and Omaha Hotel Company v. Rountze, supra. Both classes of bonds are the subject of all three of the Sections of the Judiciary Article (869, 870, 874). To require one and not the other, therefore, creates an irreconcilable conflict.

That this court has authority to entertain this motion is of course undoubted. See Rederiaktiebolazet Amie v. Transp. Company, 245 Fed. 282, and cases cited, (cert. den. 246 U. S. 675, approved Oehring v. Fox, 266 Fed. 682, and 28 U. S. C. A., Section 874) where it is held the court has power to fix supersedeas bonds after the appeal is

perfected, which would imply the power to grant a supersedeas or stay, where no security therefor is required.

A sale of the lands involved in this matter, passing title as it does to the purchaser, would perhaps leave a moot question for final decision. It would seriously injure the unsecured creditors, should appellant prevail. The sale will no doubt be a poor one anyway with the appeal pend-
[fol. 61] ing. The court having the cause before it should, we earnestly insist at all events, exercise its inherent power to stay the sale and enforcement of the decree appealed from, until the coming down of the mandate.

Respectfully submitted.

G. L. Grant, William R. Watkins, Attorneys for Appellant.

(File endorsement omitted.)

[fol. 62] In United States Circuit Court of Appeals

Brief of Appellee on Motion for Supersedeas—Filed April 23, 1929

The appellant has filed in this Court a motion to stay the decree of the lower court and to supersede same by reason of the appeal. The same motion was denied by the District Court for the Western District of Arkansas from whence comes this appeal.

A good many authorities are cited in the printed brief which within the past two or three days has just been served on counsel for the appellee, under the contention raised by the appeal that the foreclosure proceedings involved herein could not be prosecuted by the appellee without the consent of the bankruptcy court for the northern district of Texas, although the appellee has filed no claim with the trustee in bankruptcy of the Cunningham estate, and the land covered by the lien of the appellee amounting to more than $66,000.00 is all located within the jurisdiction of the Federal Court for the western district of Arkansas, and the appellant having entered his appearance in that Court and sought to invoke its jurisdiction.

The difference between the cases cited in the brief of appellee on this question is that those were ancillary proceedings in bankruptcy and the lien was created after bankruptcy, whereas, the lien in this case was created many years before the appointment of the trustee in bankruptcy of the Cunningham estate, but the only question involved in this hearing is as stated by counsel for appellant, "Can a trustee in bankruptcy appeal and have a stay of the judgment, without giving the supersedeas bond?" And where the lower court has denied the supersedeas by reason of the appeal, can this Court grant the supersedeas? It is our contention that the trustee in order to obtain a supersedeas to stay the decree of foreclosure of the lower court, must [fol. 63] give the bond as required by law.

The appellant relies upon Section 48 (B), Section 870, Title 28, of the Bankruptcy Act. We contend that this provision of the Bankruptcy Act has no application to a trustee taking an appeal from an adverse decision, and seeking to supersede a judgment against him, without his giving the bond.

We think that the case of Pacific Coast Casualty Company v. Harvey, 250 Fed., 952 from the Ninth Circuit Court of Appeals, settles this proposition, and it is the only decision that we find directly on the question involved here. In that case the Court said:

"The errors specified are: (1) That under section 25c of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 533, Comp. St. 1916, 9609, a trustee in bankruptcy is not required to give bond when he takes appeal or sues out writ of error, and that the order requiring the trustee to give bond "as a condition" to allowing his appeal was in contradiction of the statute; and (2) That, when appeal from the decision of the Circuit Court of Appeals was taken by the trustee, there was no judgment in existence against him upon which an execution could issue, in that the judgment of the District Court was in his favor, and was not reversed until after the whole case had been heard and decided by the Supreme Court, and that as a consequence the bond given could not operate as a supersedeas, as there was no possibility of a writ of execution issuing against the trustee until after his appeal had been finally determined.

"Appellant evidently misunderstands the situation when he assumes that the court required the trustee in bank- [fol. 64] ruptcy to give bond as a condition to allowing his appeal. The court allowed the appeal as prayed, and also ordered: 'That this shall operate as a supersedeas on the petitioner'd filing a bond in the sum of $5,000.00.'"

"It is true that under section 25c of the Bankruptcy Act the trustee was not required to give bond when he took the appeal or sued out writ of error; but a supersedeas pending the appeal, though an auxiliary, was a separate matter. The appellate court could undoubtedly have reviewed the proceedings, even though appellant had failed to give any bond to supersede the proceedings on a judgment or decree entered against him. Logan v. Goodwin, 104 Fed. 494, 43 C. C. A. 658. Revised Statutes, 1000 (Comp. St. 1916, 1660), is the general provision on appeal, for costs and damages, or for costs only, according to whether or not supersedeas is obtained; but we do not think that section 25c, relieving a trustee in bankruptcy from giving bond on appeal or writ of error, relieves him from the obligation to give such a bond as is required (Revised Statutes, 1000, 1007 Comp. St. 1916, 1660, 1666) of any litigant where supersedeas is desired. In re Barrett (D. C.) 132 Fed. 362. But the order of the District Judge who allowed the appeal imposed no condition with respect to the appeal. The trustee, however, was given the right to have a supersedeas, if he chose to avail himself of such right, by giving the bond specified. McCourt v. Singers-Bigger, 150 Fed. 102, 80 C. C. A. 56."

The above case cited in that opinion, McCourt v. Singers-Bigger, 150 Fed. 102, from this Circuit, lays down the rule [fol. 65] at length as to how a supersedeas may be obtained, i. e. by giving the bond required by statute.

No judgment in this case was taken against the trustee in bankruptcy. No judgment was sought. The judgment or decree of foreclosure is simply against the land. To stay the proceedings in this case until the final termination of this appeal would result in possible great financial loss to the appellee. The sale is already advertised for the 5th of May. The cost of this advertising amounts to several

hundred dollars. Again: the taxes are due and have not been paid for this year and are now a lien against the lands superior to the mortgage of the appellee or any claim in the equity in favor of the trustee. The trustee has no money with which to pay taxes or to pay costs.

Respectfully submitted.

Duty & Duty, Attorneys for Appellee.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Granting Supersedeas, Etc.—April 23, 1929

On this the 23rd day of April, 1929, came on to be heard the motion of the appellant for a stay of the sale of the property involved in this suit fully described and set forth in the decree appealed from, the appellant and appellee appearing by counsel and the court having heard and considered said motion;

It is Ordered that proceedings for the enforcement of said decree and the sale of said property be and the same [fol. 66] are hereby stayed on condition that the appellant shall on or before the 4th day of May, 1929, present and secure the approval of the United States District Judge of the Western District of Arkansas of a bond payable to the appellee in the sum of $3,500.00, conditioned that if the appellant shall not finally prevail herein he shall pay the appellee the amount of costs of sale incurred including costs of advertising the same and the master's fees and shall also pay all interest that may accrue on the indebtedness described in the decree appealed from and the judgment thereon after May 6, 1929, until the final termination of this cause and the final sale of the property herein involved and a confirmation thereof by the District Court of the United States in and for the Western District of Arkansas, if said real estate involved in this cause shall not sell under the decree of said District Court of the United States for the Western District of Arkansas, already entered herein for an amount sufficient to pay the sums for which said bond is made to cover.

This order is without prejudice to the appellee to apply for additional security, provided there be no final determination, within six months hereafter, of the validity of the order from which this appeal is taken.

Dated this 23rd day of April, 1929.

[fol. 67] In United States Circuit Court of Appeals

Praecipe for Transcript of Record—Filed April 14, 1930

Wm. R. Watkins, Attorney at Law, 703 Electric Bldg., Fort Worth, Texas

April Eleventh, 1930.

Mr. E. E. Koch, Clerk U. S. Circuit Court of Appeals, Saint Louis, Missouri.

Dear Mr. Koch:

Re Isaacs, Tr., vs. Hobbs Tie & Timber Co., No. 8584

In the above case, after considering the certificate from your Court to the Supreme Court, I have decided to move the Supreme Court to require the entire record and cause to be taken up.

Will you please, therefore, send me a certified transcript of the record in your Court, including the following?

1. The original transcript of record,

2. My motion before your Court for supersedeas or stay.

3. The Court's order entered thereon at Kansas City, on April 23, 1929, and

4. The reply to my motion filed by Hobbs Tie & Timber Company.

If the cost deposit you have in your possession is not sufficient to cover the cost of this certified transcript, advise me and we will be glad to make an additional deposit.

[fol. 68] I wish you would send me, also, as many of the printed copies of the record as you can spare, in order that I may not have to print the record for the purpose of the motion. The rules require nine copies and I have a

few here that I can use if you will let me have as many as you can spare.

Very truly yours, Wm. R. Watkins.

WRW b.

[File endorsement omitted]

[fols. 69 & 70] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 71] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION TO BRING UP ENTIRE RECORD AND CAUSE—May 19, 1930

On consideration of the motion for a writ of certiorari to bring up the entire record and cause,

It is now here ordered by this Court that the said motion be, and the same is hereby, granted.

Endorsed on cover: File No. 34,926. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 72. B. K. Isaacs, as trustee in bankruptcy of the estate of Henrietta E. Cunningham, bankrupt, vs. Hobbs Tie & Timber Company. (Certificate.) Filed April 5, 1930. File No. 34,926.